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DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 212

USCBP-2016-0003; CBP Dec. 16-03

RIN 1651-AB09

Elimination of Nonimmigrant Visa Exemption for Certain Caribbean Residents Coming to the United States as H-2A Agricultural Workers

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: Interim final rule; solicitation of comments.

SUMMARY: This interim final rule revises Department of Homeland Security regulations to eliminate the nonimmigrant visa exemption for certain Caribbean residents seeking to come to the United States as H-2A agricultural workers and the spouses or children who accompany or follow these workers to the United States. As a result, these nonimmigrants will be required to have both a valid passport and visa. The Department of State is revising its parallel regulations.

DATES: Effective Date: The effective date of the rule is February 19, 2016.

Comment Date: Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

ADDRESSES: Please submit comments, identified by docket number, by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP-2016-0003.

- Mail: Border Security Regulations Branch, Office of International Trade, U.S. Customs and Border Protection, 90 K Street, NE., 10th Floor, Washington, DC 20229-1177.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and 19 CFR 103.11(b) on normal business days between the hours of 9 a.m. and 4:30 p.m. at the Border Security Regulations Branch, Office of International Trade, U.S. Customs and Border Protection, 90 K Street, NE., 10th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325-0118.

FOR FURTHER INFORMATION CONTACT: Rafael Henry, U.S. Customs and Border Protection, Office of Field Operations, (202) 344-3251, or via email at rafael.e.henry@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

I. Public Comments

Interested persons are invited to submit written comments on all aspects of this interim final rule. U.S. Customs and Border Protection (CBP) also invites comments on the economic, environmental, or federalism effects of this rule. We urge commenters to reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authorities that support such recommended change.

II. Background

In general, nonimmigrant aliens are required to present an unexpired passport and a valid unexpired visa in order to be admitted to the United States. See section 212(a)(7)(B)(i) of the Immigration and Nationality Act, as amended (INA) (8 U.S.C. 1182(a)(7)(B)(i)). However, either or both of these requirements may be waived by the Secretary of Homeland Security¹ and the Secretary of State, acting jointly, in specified situations, as provided in section 212(d)(4) of the INA (8 U.S.C. 1182(d)(4)). The Department of Homeland Security (DHS) regulations list those classes of persons that are not required to present a visa (or a passport, in some cases). See 8 CFR 212.1.

The H-2A nonimmigrant classification applies to an alien seeking to enter the United States to perform agricultural labor or services of a temporary or seasonal nature in the United States. Generally, H-2A agricultural workers are required to possess and present both a passport and a valid unexpired H-2A visa when entering the United States. Certain residents of the Caribbean, however, are exempted by regulation from having to possess and present a valid unexpired H-2A visa , and only must possess and present a valid unexpired passport to be admitted to the United States as a temporary agricultural worker.

Specifically, a visa is currently not required for H-2A agricultural workers who are British, French, or Netherlands nationals, or nationals of Barbados, Grenada, Jamaica, or Trinidad and Tobago, who have their residence in British, French, or Netherlands territory located in the adjacent islands of the Caribbean area, or in Barbados, Grenada, Jamaica, or Trinidad and Tobago. 8 CFR 212.1(b)(1)(i). Additionally, a visa is currently not required

¹ Pursuant to sections 102(a), 441, 1512(d) and 1517 of the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, 6 U.S.C. 112(a), 251, 552(d), 557, and 8 CFR 2.1, the authorities of the Attorney General, as described in section 212 of the INA (8 U.S.C. 1182), were transferred to the Secretary of Homeland Security, and the reference to the Attorney General in the statute is deemed to refer to the Secretary.

for the spouse or child accompanying or following to join such an H-2A agricultural worker. 8 CFR 212.1(b)(1)(iii). The current regulation also provides that a visa is not required for the beneficiary of a valid, unexpired indefinite certification granted by the Department of Labor (DOL) for employment in the U.S. Virgin Islands, if the beneficiary is proceeding to those islands for such purpose and is a British, French, or Netherlands national, or national of Barbados, Grenada, Jamaica, or Trinidad and Tobago, who has his or her residence in British, French, or Netherlands territory located in the adjacent islands of the Caribbean area, or in Barbados, Grenada, Jamaica, or Trinidad and Tobago. The regulation also provides that a visa is not required for the spouse or child accompanying or following to join such a beneficiary. 8 CFR 212.1(b)(1)(ii)-(iii). Department of State (State) regulations also describe the visa exemption for these classes of Caribbean residents. See 22 CFR 41.2(e). However, as discussed below, the justification for providing this visa exemption for such beneficiaries and their spouses and children is now obsolete; further, this visa exemption creates a security loophole that could be exploited by persons who pose a danger to the United States.

The visa exemption for agricultural workers from the specified Caribbean countries dates back more than 70 years and was created primarily to address U.S. labor shortages during World War II by expeditiously providing a source of agricultural workers from the British Caribbean to meet the needs of agricultural employers in the southeastern United States. Given the passage of time, this basis for the exemption no longer justifies it.

Since H-2A agricultural workers from the specified Caribbean countries are exempt from the visa requirement, they do not undergo the same visa issuance process as H-2A applicants from other countries. The absence of a visa requirement for these H-2A workers

means that these individuals do not undergo a face-to-face consular interview, the adjudication of the applicants eligibility and qualification for the intended position, screening for potential fraudulent employment, and the associated fingerprint and security checks prior to seeking admission at a U.S. port of entry. Further, in the absence of the visa requirement, there is significantly less advance opportunity for the U.S. Government to determine whether other requirements for H-2A classification, such as the bar to collection of prohibited fees from prospective H-2 workers, have been satisfied.

DHS, in conjunction with the Department of State (“State”), has determined that the nonimmigrant visa exemption for these classes of Caribbean residents, coming to the United States as H-2A agricultural workers or as the spouses or children accompanying or following these workers, is outdated and incongruent with the visa requirement for other H-2A agricultural workers from other countries. DHS and State believe that eliminating the visa exemption furthers the national security interests of the United States.

The application of the general visa requirement to the class of Caribbean agricultural workers described above will ensure that these applicants for admission, like other H-2A agricultural workers, are sufficiently screened via State’s visa issuance process prior to arrival in the United States. In addition, the visa requirement will ensure that these persons possess evidence of the intended purpose of their stay in the United States upon arrival at a U.S. port of entry. This will lessen the possibility that persons who pose security risks to the United States and other potential immigration violators may improperly gain admission to the United States.

Furthermore, extending the visa requirement to these Caribbean H-2A agricultural workers will allow U.S. Government officials to interview prospective H-2A workers and

will help to better ensure that such workers are protected from certain employment and recruitment-based abuses, including, but not limited to, the imposition of fees prohibited under 8 CFR 214.2(h)(5)(xi). In addition, the visa requirement will help ensure that agricultural workers have been informed, and are aware of, their rights and responsibilities before departing from their home countries to engage in H-2A agricultural work. See 8 U.S.C. 1375b.

As a result of the termination of the relevant worker program in the U.S. Virgin Islands, DOL no longer grants indefinite certifications for employment in the U.S. Virgin Islands. See section 3 of the Virgin Islands Nonimmigrant Alien Adjustment Act of 1982, Pub. L. 97-271, 96 Stat. 1157, as amended (8 U.S.C. 1255 note). Therefore, the visa exemption for certain Caribbean residents for the beneficiary of a valid, unexpired indefinite certification granted by DOL for employment in the U.S. Virgin Islands, if the beneficiary was proceeding to those islands for such purpose, or for the spouse or child accompanying or following to join such a beneficiary, set forth in 8 CFR 212.1(b)(1)(ii)-(iii), is now obsolete.

Accordingly, DHS, in conjunction with State, is eliminating the visa exemption for these Caribbean H-2A agricultural workers and the spouses or children accompanying or following these workers. 8 CFR 212.1(b)(1). This means that, in addition to a valid passport, these nonimmigrant aliens are now required to obtain a nonimmigrant visa prior to traveling to the United States. In order to obtain a visa, these nonimmigrant aliens will have to submit a visa application to and appear for an interview at the applicable U.S. embassy² or consulate, and undergo Department of State's visa screening process. Additionally, DHS, in conjunction with State, is eliminating the obsolete visa exemption for the beneficiaries of

² See <http://www.usembassy.gov/>.

DOL indefinite certifications for employment in the U.S. Virgin Islands and their spouses and children. State is publishing a parallel amendment to 22 CFR 41.2(e) in the **Federal Register**.

As a result of the elimination of 8 CFR 212.1(b)(1), current 8 CFR 212.1(b)(2) is being redesignated as 8 CFR 212.1(b). DHS is also making a technical correction updating the language in current 8 CFR 212.1(b)(2)(ii)(C) referring to “a current Certificate of Good Conduct issued by the Royal Virgin Islands Police Department” to refer to “a current certificate issued by the Royal Virgin Islands Police Force” in new 8 CFR 212.1(b)(2)(iii).

III. Statutory and Regulatory Requirements

A. Administrative Procedure Act

The implementation of this rule as an interim final rule, with provisions for post-promulgation public comments, is based on the good cause exception found in section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)(B)). There is reasonable concern that publication of the rule as a proposed rule, which would permit continuation of the current visa exemption, could lead to an increase in applications for admissions in bad faith by persons who would otherwise have been denied visas and are seeking to avoid the visa requirement and consular screening process during the period between the publication of a proposed and a final rule. Accordingly, DHS finds that it is impracticable and contrary to the public interest to publish this rule with prior notice and comment period. Under the good cause exception, this rule is exempt from the notice and comment and delayed effective date requirements of the APA.

In addition, DHS is of the opinion that eliminating the visa exemption and requiring a visa for Caribbean H-2A agricultural workers, and the spouses or children accompanying or

following these workers, is a foreign affairs function of the U.S. Government under section 553(a) of the APA (5 U.S.C. 553(a)). As this rule implements this function, DHS is of the opinion that this rule is also exempt from the notice and comment and 30-day delayed effective date requirements of the APA by virtue of the foreign affairs exception in 5 U.S.C. 553(a)(1). DHS is nevertheless providing the opportunity for the public to provide comments.

B. Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. DHS is of the opinion this rule is not subject to the requirements of Executive Orders 13563 and 12866, due to the foreign affairs exception described above. However, DHS has nevertheless reviewed the interim final rule to ensure its consistency with the regulatory philosophy and principles set forth in those Executive Orders.

Currently, British, French, and Netherlands nationals and nationals of Barbados, Grenada, Jamaica, and Trinidad and Tobago, who have their residence in British, French, or Netherlands territory located in the adjacent islands of the Caribbean area or in Barbados, Grenada, Jamaica, or Trinidad and Tobago, are not required to obtain a visa before traveling to the United States as H-2A agricultural workers. This rule would require these prospective H-2A agricultural workers to obtain a visa prior to travel to the United States. Any spouses

or children of these workers will also now have to obtain a visa before being brought to the United States. Since more than 99 percent of such workers³ came from Jamaica, our analysis will focus on that country. This rule will also eliminate the visa exemption for workers in the U.S. Virgin Islands pursuant to an unexpired indefinite certification granted by DOL. Because these certifications have been obsolete for many years,⁴ eliminating them will have no effect on the economy; hence, we will exclude this provision for the remainder of the analysis.

Data on the number of visa applications Jamaican travelers would need to obtain as a result of this rule is not available. A USCIS database tracks the number of petitions for H-2A workers from Jamaica, but does not include the spouses or children who would now also need visas to travel to the United States. A CBP database tracks the number of Jamaican nationals arriving under the H-2A program, but counts multiple arrivals by a single person as separate arrivals. For the purposes of this analysis, we use the number of petitions as our primary estimate of the number of visas that would be needed under this rule. We use the number of total travelers from Jamaica under the H-2A program to illustrate the upper bound of costs that could result from this rule.

Employers petitioned on behalf of an annual average of 165 workers from Jamaica under this program from FY 2011-2013,⁵ and an annual average of 4,010 Jamaicans arrived during that time period,⁶ which includes arrivals by H-2A agricultural workers as well as their spouses and children. This number also includes multiple arrivals in the same year by

³ CBP's BorderStat Database (internal database), accessed November 2, 2015.

⁴ See section 3 of the Virgin Islands Nonimmigrant Alien Adjustment Act of 1982, Pub. L. 97-271, 96 Stat. 1157, as amended (8 U.S.C. 1255 note).

⁵ Communication with USCIS on August 7, 2014.

⁶ CBP's BorderStat Database (internal database), accessed August 4, 2014.

the same individuals. Because the number of unique individuals arriving from Jamaica under the H-2A program is not available, we calculate costs based on a range of 165 (our primary estimate) to 4,010 prospective visa applicants. The current nonimmigrant visa application processing fee, also called the Machine-Readable Visa (MRV) fee, is \$190. We assume this fee will be paid by the employer for the workers and by the employees for their spouses and children. We estimate that the imposition of the fee will cost workers or employers in aggregate between \$31,350 (our primary estimate) and \$761,900 per year.

Under this rule, workers would have to apply for a visa using Form DS-160 and undergo an interview at a U.S. embassy or consulate prior to traveling to the United States. According to the Paperwork Reduction Act estimate for Form DS-160, the Department of State estimates that the visa application takes 1.25 hours to complete. The interview itself typically lasts approximately 5-10 minutes; however, when accounting for potential wait time, the interview process may take up to 2 hours. Since the only U.S. embassy in Jamaica is in Kingston, visa applicants may have to travel up to 3.5 hours each way to appear for an interview, depending on their location. We therefore assume that filling out the D-160, traveling to and from the embassy for the visa interview, and the visa interview itself will require a total of 10.25 hours of the applicant's time. To the extent the actual time burden to travel to and from the interview is less than we estimated, costs would be lower. Using the average Jamaican wage rate of \$3.25/hour⁷ and a range of 165 to 4,010 workers per year, we estimate the cost of the time to Jamaican nationals in aggregate as a result of this rule to be

⁷ Derived from International Labor Association's LABORSTA Internet Database. Available at <http://laborsta.ilo.org/STP/guest>. Accessed August 5, 2014. Our weekly wage estimate (14,826 Jamaican Dollars per week) is from the "Wages, by economic activity" report for all sectors in 2008. Our weekly hours worked estimate (40.7 hours per week) is from the "Hours of work, by economic activity" report for all sectors in 2008. We converted the wage rate to U.S. dollars using the currency converter available at <http://www.xe.com/currencyconverter> on August 5, 2014. 14,826 Jamaican Dollars divided by 40.7 hours per week, multiplied by 0.008913 Jamaican dollars per U.S. dollar = \$3.25 U.S. dollars per hour.

between \$5,497 (our primary estimate) and \$133,583 per year. Combining this with the cost of the visa application fee, we estimate that the total annual cost of this rule is between \$36,847 and \$895,483.

We are unable to quantify the benefits of this rule; therefore we discuss the benefits qualitatively. Requiring these prospective H-2A agricultural workers to obtain visas will ensure that they are properly screened prior to arrival in the United States. This will lessen the possibility that a person who poses a security risk to the United States and other potential immigration violators may improperly gain admission to the United States. DHS has determined that visitors from the countries affected by this rule are not a lower security risk than those coming from other countries; therefore, CBP believes that they should be subject to the same screening prior to arriving at their port of entry. Also, prescreening and appearing before consular officers will provide greater opportunities to ensure compliance with DHS and DOL H-2A rules, including those regulatory provisions prohibiting charging fees to workers in connection with or as a condition of their employment or recruitment.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires an agency to prepare a regulatory flexibility analysis that describes the effect of a proposed rule on small entities when the agency is required to publish a general notice of proposed rulemaking. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer

than 50,000 people). Because this interim final rule is exempt from notice and comment rulemaking under 5 U.S.C. 553, a regulatory flexibility analysis is not required.

List of Subjects in 8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

Amendments to Regulations

Part 212 of title 8 of the Code of Federal Regulations is amended as set forth below:

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANT; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

1. The general authority citation for part 212 and the sectional authority citation for § 212.1(q) continue to read as follows:

Authority: 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1255, 1359; 8 U.S.C. 1185 note (section 7209 of Public Law 108–458); 8 CFR part 2.

Section 212.1(q) also issued under section 702, Public Law 110-229, 122 Stat. 754, 854.

2. In § 212.1, revise paragraph (b) to read as follows:

§ 212.1 Documentary requirements for nonimmigrants.

* * * * *

(b) Nationals of the British Virgin Islands. A visa is not required of a national of the British Virgin Islands who has his or her residence in the British Virgin Islands, if:

(1) The alien is seeking admission solely to visit the Virgin Islands of the United States; or

(2) At the time of embarking on an aircraft at St. Thomas, U.S. Virgin Islands, the alien meets each of the following requirements:

(i) The alien is traveling to any other part of the United States by aircraft as a nonimmigrant visitor for business or pleasure (as described in section 101(a)(15)(B) of the Act);

(ii) The alien satisfies the examining U.S. immigration officer at the port-of-entry that he or she is clearly and beyond doubt entitled to admission in all other respects; and

(iii) The alien presents a current certificate issued by the Royal Virgin Islands Police Force indicating that he or she has no criminal record.

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DATE: January 19, 2016.

Jeh Charles Johnson,
Secretary of Homeland Security.

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